

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1514

COMMONWEALTH

vs.

LLOYD LANCE LEWIS.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

After a jury-waived trial in the Superior Court, the defendant was convicted of numerous violations of the controlled substance and firearms laws.¹ On appeal he contends that his motion to suppress should have been allowed and that the evidence was insufficient to prove that he possessed the firearms and ammunition seized pursuant to the warrant. We affirm.

1. Probable cause. The defendant contends that the search warrant affidavit did not establish probable cause to search his basement apartment for drugs because it did not accurately or

¹ The trial judge found the defendant guilty of one count of possession with intent to distribute a class A substance, one count of possession with intent to distribute a class B substance, one count of possession of ammunition without a firearms identification (FID) card, two counts of possession of a firearm without an FID card, and two counts of possession of a firearm while committing a felony.

specifically describe where he lived, did not provide any details about the interior of the basement, and did not adequately describe the connection between the defendant's drug sales and the apartment.

"[O]ur inquiry as to the sufficiency of the search warrant application always begins and ends with the 'four corners of the affidavit.'" Commonwealth v. O'Day, 440 Mass. 296, 297 (2003), quoting Commonwealth v. Villella, 39 Mass. App. Ct. 426, 428 (1995). For an affidavit to establish probable cause to search, it "must contain enough information for an issuing magistrate to determine that the items sought are related to the criminal activity under investigation, and that they reasonably may be expected to be located in the place to be searched at the time the search warrant issues." Commonwealth v. Cinelli, 389 Mass. 197, 213, cert. denied, 464 U.S. 860 (1983). We need not parse the affidavit in the manner the defendant suggests; rather, "[t]he affidavit should be read in an ordinary, common-sense manner, without hypertechnical analysis." Commonwealth v. Cruz, 430 Mass. 838, 840 (2000). See Brinegar v. United States, 338 U.S. 160, 175 (1949) ("In dealing with probable cause, . . . we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act").

The search warrant affidavit described an investigation that began when a reliable confidential informant² told the police that the informant they had been present when the defendant sold heroin. The informant described the defendant, provided the address of the building where the defendant lived in the basement apartment, and further explained that the defendant's mother lived in unit number two of the same building. Based on this information, the police supervised the informant in the execution of two controlled buys. Within sixty days of the warrant application, the informant contacted the defendant on the defendant's cell phone and set up a transaction. The informant went to the side door of the building, where the entrance to the basement apartment was located. At the side door, the informant purchased from the defendant a plastic bag containing a substance believed to be heroin. Within seventy-two hours of the warrant application, the police supervised the informant in a second controlled buy. Again the informant went to the side door of the building after

² The defendant makes no claim that the confidential informant did not satisfy the Aguilar-Spinelli test. Accordingly, we may rely on the information provided by the informant to establish the nexus between the defendant's drug distribution activities and the apartment. See Commonwealth v. Perez, 90 Mass. App. Ct. 548, 553 (2016). In any event, the police's supervision of the informant in the two properly executed controlled purchases from the defendant provided sufficient corroboration to overcome any shortfalls in the informant's reliability. See id. at 554.

contacting the defendant on his cell phone, but this time the informant entered the building. Inside, the informant purchased from the defendant a plastic bag containing a substance believed to be heroin. Critically, the informant told the police "that the transaction took place inside of the basement apartment" of the building.

The affidavit, when "read as a whole, not parsed, severed, and subjected to hypercritical analysis," Commonwealth v. Blake, 413 Mass. 823, 827 (1992), provided a substantial basis to conclude that drugs would be located in the defendant's basement apartment. "The nexus between the items to be seized and the place to be search[ed] need not establish to a certainty that the items to be seized will be found in the location specified in the warrant, nor exclude any and all possibility that the items might be found elsewhere. Rather, the test is probable cause, not certainty." Commonwealth v. Thevenin, 82 Mass. App. Ct. 822, 826 (2012). The motion judge did not err in denying the defendant's motion to suppress.

2. Sufficiency of the evidence. The defendant contends that the evidence was insufficient to prove beyond a reasonable doubt that he possessed the firearms and ammunition found above the dropped ceiling tiles in the closet of the basement apartment. The defendant focuses on the fact that, unlike the narcotics, which the defendant admitted were his, the firearms

and ammunition were discovered in the ceiling, and one of the firearms had a latent thumbprint that did not belong to the defendant.

"In reviewing the denial of a motion for a required finding of not guilty, we view the evidence in the light most favorable to the Commonwealth in order to determine whether the evidence was sufficient to satisfy a rational trier of fact of each element of the offense beyond a reasonable doubt." Commonwealth v. Brown, 401 Mass. 745, 747 (1988). The Commonwealth proceeded on a theory of constructive possession. "[T]o prove constructive possession, the Commonwealth must present evidence that the defendant had both knowledge of the contraband and the ability and intention to exercise dominion and control over it." Commonwealth v. Ortega, 441 Mass. 170, 174 (2004). The Commonwealth may prove these elements through circumstantial evidence and reasonable inferences drawn therefrom. Id. While the defendant's presence in proximity to the contraband does not by itself establish constructive possession, other incriminating evidence connecting the defendant to the contraband "will serve to tip the scale in favor of sufficiency." Commonwealth v. Albano, 373 Mass. 132, 134 (1977), quoting United States v. Birmley, 526 F.2d 103, 108 (6th Cir. 1976).

The evidence permitted the judge to find beyond a reasonable doubt that the defendant lived in the basement

apartment. When the officers executed the search warrant, they found the defendant and an unidentified female in the apartment. The apartment was small, with a kitchen, living room, bathroom, and one bedroom with an adjacent closet. Before conducting the search, the officers asked the defendant if there was anything in the apartment. He responded by stating that he had some drugs in a Remy Martin container. This container, in which officers found heroin, was located in the closet adjacent to the bedroom. Also inside the closet the officers found men's clothing, and the defendant's passport. In a drawer in the nearby bedroom, officers found the defendant's resume, and an identification card. Elsewhere in the apartment the officers found a set of keys that opened the door to the basement unit. "Residential status is a 'relevant inculpatory factor' to be considered, since it indicates more than mere presence." Commonwealth v. Frongillo (No. 1), 66 Mass. App. Ct. 677, 680 n.9 (2006), quoting Commonwealth v. Handy, 30 Mass. App. Ct. 776, 781 n.5 (1991).

Additional evidence supported the inference that the defendant knew where the firearms and ammunition were hidden and had the ability and intent to control them. Prior to conducting the search, the officers noticed that a ceiling tile in the kitchen was dislodged. Above the tiles, the officers found a plastic bag containing white tablet fragments and white powder.

Although possession of the tablets was not criminal, their presence in the ceiling supported the inference that the defendant used the ceiling tiles in the apartment as a hiding place.

The firearms and ammunition were discovered above the ceiling tiles of the closet where the defendant's personal items were found and where the heroin that the defendant admitted to owning was located. See Commonwealth v. Rarick, 23 Mass. App. Ct. 912, 912-913 (1986) (evidence sufficient where narcotics found in bedroom with defendant's personal effects, even though defendant was not sole occupant of dwelling). With the two firearms hidden in the ceiling, the officers found an empty bottle of Mannitol, a drug-cutting agent. The search of the apartment revealed other indicia of drug dealing, including scales, sandwich bags, and cut-off pieces of those bags. The placement of the Mannitol bottle linked the firearms and ammunition to the defendant's drug activity. See Commonwealth v. Boria, 440 Mass. 416, 420 (2003), quoting Commonwealth v. Pratt, 407 Mass. 647, 652 (1990) ("Contraband found in proximity to a defendant's personal effects may provide a link between a defendant and the contraband, if other evidence shows that 'the defendant has a particular relationship' to that location within the apartment").

Taken together, these facts support the conclusion that the defendant knew of the firearms and ammunition, and had the ability and intent to control them. See Commonwealth v. Madera, 76 Mass. App. Ct. 154, 164-165 (2010) (sufficient evidence of constructive possession where narcotics and paraphernalia found in headboard compartment of bed and in plain view in bedroom where defendant and his girlfriend slept and where his clothes and driver's license were found); Commonwealth v. Yazbeck, 31 Mass. App. Ct. 769, 775 (1992) (sufficient evidence that defendant, present on two occasions when officers visited house, constructively possessed narcotics found in locked closet of basement accessible from main residence, where presence supplemented with other incriminating evidence); Commonwealth v. Rivera, 31 Mass. App. Ct. 554, 556-557 (1991) (sufficient evidence that defendant, present when search warrant executed, constructively possessed narcotics found inside film canister in suitcase in bedroom where defendant frequently stayed and where her personal belongings were found). See also Commonwealth v. Gonzalez, 42 Mass. App. Ct. 235, 237 (1997) (defendant's ability to exercise control apparent from "his right of access to the adjacent common porch").

The defendant's reliance on Frongillo (No. 1), 66 Mass. App. Ct. at 682-684, and Commonwealth v. Delarosa, 50 Mass. App. Ct. 623, 628 (2000), is misplaced. In Frongillo (No. 1), supra

at 684, aside from unidentified men's clothing, "there were no other personal effects connecting the defendant to the guns and ammunition found in the closets," and in Delarosa, supra, there was no evidence, "such as clothing or papers, of a personal connection between the defendant and the room in which the stash was located." Here, the defendant's personal effects and passport were found in the same closet where the guns and ammunition were hidden.

The fact that a fingerprint on one of the firearms belonged to someone else does not change this conclusion. The Commonwealth "need not exclude every reasonable hypothesis of innocence, provided the record as a whole supports a conclusion of guilt beyond a reasonable doubt." Commonwealth v. Merola, 405 Mass. 529, 533 (1989), quoting United States v. Systems Architects, Inc., 757 F.2d 373, 377 (1st Cir.), cert. denied, 474 U.S. 847 (1985). Although not required to do so, the Commonwealth presented evidence to explain the absence of the defendant's fingerprints on the firearms. The Commonwealth's fingerprint analyst testified that individuals can touch objects and not leave fingerprints. The analyst also testified that only a small percentage of items submitted for testing have fingerprints that can be successfully recovered and compared, and that the wood grip on one of the firearms made recovering fingerprints more difficult. Moreover, even if another person

may also have possessed the firearms, constructive possession "need not be exclusive." Rivera, 31 Mass. App. Ct. at 556. See Madera, 76 Mass. App. Ct. at 165 (exclusive dominion over bedroom where drugs found "not a requirement of constructive possession").

Judgments affirmed.

By the Court (Green, C.J.,
Massing & Shin, JJ.³),

Joseph F. Stanton

Clerk

Entered: August 12, 2019.

³ The panelists are listed in order of seniority.